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No. 90-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID L. FITZ,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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ARGUMENT

David L. Fitz ("Fitz"), petitioner, herein replies to the Brief in Opposition of the Communications Workers of America, et al., respondents ("CWA"). At issue is the appropriate limitations period to be applied to claims for relief under this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988) ("*Beck*"). Fitz submits that *Beck* cases are quasi-constitutional; accordingly, the limitations period for constitutional claims is to be applied. Therefore, this Reply addresses the reasons why CWA's belief is invalid that the six-months limitations period governing unfair labor practice charges applies here.

THE COURT HAS NOT ADDRESSED THE QUESTION PRESENTED

CWA does not, and could not, state that this Court has previously addressed the limitations question presented. Though *Beck* is of relatively recent vintage, its distinguished forebearers, *Street*[1], *Allen*[2], *Ellis*[3], and *Abood*[4] all considered aspects of either the existence or nature of the substantive claim for relief. No case before this Court has considered or resolved the explicit limitations question presented by the *Fitz* petition.

CWA does not dispute Fitz's demonstration of the importance of the issue presented to the many thousands of employees compelled to support the non-bargaining expenditures of CWA and other labor organizations, expenditures which include significant amounts for promotion or defeat of candidates for public office, legislative lobbying, and other activities no one doubts are political in nature. Further, the limitations issue has

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[1] *Machinists v. Street*, 367 U.S. 740 (1961).

[2] *Railway Clerks v. Allen*, 373 U.S. 113 (1963).

[3] *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

[4] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

application beyond the employee-labor organization relationship, for resolution of the issue would redound to the benefit of bar association members challenging bar association exactions under this Court's decision in *Keller*.[5]

For these reasons, a new, serious and substantial issue of broad application is presented for resolution by this Court.

THE NATURE OF *BECK* CLAIMS WARRANTS APPLICATION OF THE LIMITATIONS PERIOD GOVERNING CONSTITUTIONAL CASES

State Action

Fitz, in his opening brief at 8-15, sets forth the factual and legal basis for concluding that constitutional considerations infuse his claims under *Beck*.[6] CWA responds by citing two cases in which courts have denied direct relief for *Beck* claims made on First Amendment grounds.[7] Fitz neither denies the existence of those authorities, nor that they stand for the proposition for which CWA cites them. However, those cases conflict with the

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[5] *Keller v. State Bar*, ___ U.S. ___, 110 S. Ct. 2228 (1990).

[6] That argument can best be summarized by citation to the position expressed by Mr. Justice Black: "Yet no one has suggested that the Court's statutory construction of § 2, Eleventh [of the Railway Labor Act] could possibly be supported without the crutch of its fear of unconstitutionality." *Machinists v. Street*, 367 U.S. at 786 (1961) (Black, J., dissenting.) Under *Beck*, 487 U.S. at 745, § 2, Eleventh of the Railway Labor Act involved in *Street*, and § 8(a)(3) of the National Labor Relations Act involved in the instant case, are to be interpreted the same.

[7] Brief in Opposition ("Opp. Br.") at 9. Those case are *Abrams v. Communications Workers*, 702 F. Supp. 920 (D.D.C. 1988), *aff'd by adoption*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 540 (1989); and *Price v. Auto Workers*, 772 F. Supp. 933 (D. Conn. 1989), *aff'd*, ___ F.2d ___, 1991 WestLaw 26726 (2d Cir. 1991).

recent holding in *Dean v. Trans World Airlines*.[8] *Dean* is a Railway Labor Act case in which the procedural requirements of this Court's public-sector *Hudson*[9] decision were applied to protect an employee from union exactions for non-bargaining purposes. *Dean* states:

> *Hudson* establishes "constitutional requirements for the Union's collection of agency fees." (Citation omitted.) Without these procedures in place, the [public-sector and the private-sector] union has no right to enforce an agency shop agreement to collect fees for use in any union activity beyond collective bargaining.[10]

Thus, there is a direct conflict in the circuits as to the application of constitutional principles to unions' exactions of fees from nonmembers for purposes other than collective bargaining.[11]

In another context, CWA's counsel has acknowledged the validity of the "state action" argument Fitz presents. It is admitted, for example:

> [E]xclusive representation . . . significantly and necessarily alters the legal rights of each individual in the group [of represented employees] . . . .[12]
>
> A more complicated system of balanced interests thus emerges [from the statutory scheme], with the bargaining representative granted significant powers and legal protec-

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[8] 924 F.2d 805 (9th Cir. 1991).

[9] *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986).

[10] 924 F.2d at 809.

[11] This is a question explicitly left open by this Court. *Beck*, 487 U.S. at 761.

[12] Brief of the American Federation of Labor and Congress of Industrial Organizations ("AFL Br.") at 8, filed in *Reed v. United Transp. Union*, 488 U.S. 319 (1989).

> tions [by the National Labor Relations Act], but made subject to certain public policy limits.[13]
>
> [U]nions themselves exist and operate under powers and protection conferred by the Federal Government in a unique manner and to an unequal degree.[14]
>
> "Central to the peculiar status and function of a collective bargaining agreement is the fact . . . that it is not in any real sense simply the product of a consensual relationship."[15]

Of course, nowhere, is the unique authority of a labor organization under our labor statutes more graphically illustrated than in cases in which employees are discharged for refusal to pay fees illegally demanded under *Beck*. *Fitz* is such a case. CWA admits that Fitz was discharged because "he believed that the CWA had not given sufficient support to a strike by the International Brotherhood of Electrical Workers that occurred while Mr. Fitz belonged to that union."[16] In litigation, however, CWA seeks to justify Fitz's discharge on grounds that the union "was suffering the loss of the contractual protections contained in the collective bargaining agreement by reason of Mr. Fitz's refusal to make the required agency fee payments."[17] Never has such callous action been so disingenuously stated. CWA does *not* advise the Court that the amounts demanded were equivalent to a full and voluntary member's dues to which it had no right under this court's precedents, not the *Beck* collective bargaining charge to which it may have been entitled.

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[13] *Id.* at 9.

[14] *Id.* at 12 (citing the remarks of Senator McClellan, 105 Cong. Rec. 5806 (1959), reprinted in II NLRB Legislative History of the LMRDA 1098).

[15] *Id.* at 29 (quoting *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964)).

[16] Opp. Br. at 1-2.

[17] *Id.* at 2.

CWA also digresses at length on the existence of its faulty policy, condemned by *Ellis*[18], under which employees could obtain a post-collection, post-spending return of the union's excessive exactions.[19] CWA then suggests that it is a pleading flaw that Fitz "has not alleged that he invoked the Union's objection procedure."[20] *What CWA does not say is that the evidence would show that Fitz was not advised, by CWA or anyone else, of CWA's "objection procedure" at any time prior to his discharge.*[21] In any event, CWA, not Fitz, has the burden of showing that its "procedure" was timely presented and fully protective of Fitz's *Beck* rights.[22]

Reed

Fitz argues that even if this Court were not to hold that constitutional considerations directly control all aspects of *Beck* claims, the analysis employed by this Court in *Reed*[23] is equally applicable to *Beck* cases in determining the appropriate limitations period.[24] CWA opposes that argument by referring to that part of *Reed* stating that Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA")[25] "'implements a

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[18] 466 U.S. 435 (1984).

[19] Opp. Br. at 3 n.2.

[20] *Id.* The decisions below were not, in any respect whatsoever, predicated on a failure of pleading in this or any other regard. Indeed, CWA made no such claim below.

[21] CWA's discussion of the conclusions of the NLRB Regional Director, referred to in Opp. Br. at 2, is not to the contrary. The Regional Director found that CWA advised Fitz of the "amounts owed," but those amounts were the unlawfully demanded equivalent to a member's dues, *not* a *Beck* collective bargaining charge.

[22] *Street*, 373 U.S. at 122.

[23] *Reed v. United Transp. Union*, 488 U.S. 319 (1989).

[24] Opening Br. at 15-20.

[25] 29 U.S.C § 411.

federal policy . . . that simply had no part in the design of a statute of limitations for unfair labor practice charges'"[26] As *Reed* involved employees' rights under LMRDA § 101(a)(2)[27], which this Court characterized as "restat[ing] a principal First Amendment value,"[28] the language CWA quotes favors resolution of the issue in Fitz's favor, not CWA's.

Adams

Fitz also relies on the analysis in *Adams v. Gould, Inc.*[29] pertaining to the applicable limitations period.[30] CWA attempts to distinguish *Adams* by asserting that there is an "overlap" between Fitz's *Beck* claim, which contains a duty of fair representation element, and an unfair labor practice claim which is not present in *Adams*.[31] But such "overlap" as may exist is also present in *Adams*, for CWA concedes that the employees' claim in *Adams* contained "a fair representation aspect."[32] And that

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[26] Opp. Br. at 8, citing *Reed*, 488 U.S. at 332.

[27] In pertinent part, the section provides, "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions . . . ."

[28] *Reed*, 488 U.S. at 325.

[29] 739 F.2d 858 (3d.Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985).

[30] Opening Br. at 18-19.

[31] Fitz acknowledges that to some extent it could be said that there is "overlap" between the claim presented here and his unfair labor practice claim. However, the fact that they may "overlap" in some sense cannot obscure their pronounced differences. His federal court lawsuit is brought to vindicate his private claim. As a matter of law, his unfair labor practice claim was brought to vindicate public rights. *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967). ("The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair practice remedies.") Thus, only if Fitz had received an award as a result of his unfair labor practice and were here disputing the sufficiency of the award would there be "overlap" of a preclusive kind.

[32] Opp. Br. at 6 n.3.

"fair representation aspect" in *Adams* did not impose an abbreviated limitations period, and should not do so here.

Moreover, *Reed* also contains duty of fair representation and unfair labor practice elements. That supposed "overlap" is no more a basis for refusing to apply *Adams* than it is *Reed*. For this Court rejected the argument made in *Reed* that the existence of duty of fair representation and unfair labor practice elements in a Title I claim called for application of a curtailed limitations period.[33]

Counsel for CWA in the instant case also submitted the *amicus* brief of the American Federation of Labor and Congress of Industrial Organizations in *Reed* as noted above. That *amicus* brief repeatedly made the "overlap" argument which *Reed* rejected. It was claimed, for example, that:

> [T]here is a "substantial overlap" of coverage between LMRDA Title I on the one hand, and the NLRA unfair labor practice provisions and the duty of fair representation on the other.[34]
>
> [A]t least in theory virtually all Title I claims alleging discipline based on "dissident" activities can be brought as a § 8(b)(l)(A) charge as well.[35]

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[33] "Even were it the case, however, that Title I violations may constitute unfair labor practices and breaches of the duty of fair representation . . . we would still hold this resemblance inconclusive as regards the question whether § 101 actions should be governed by a state statute of limitations or by NLRA § 10(b)." *Reed*, 488 U.S. at 333 n.7.

[34] AFL Br. at 2.

[35] *Id.* at 3.

> Congress passed the LMRDA "for the same reasons" that motivated the Court in crafting the duty of fair representation . . . .[36]

> [U]nder the current state of the law, the overlap between LMRDA Title I and NLRA § 8(b)(1)(A) is near total.[37]

> [N]either do all duty of fair representation claims implicate the concerns for industrial stability expressed in *DelCostello* [*v. Teamsters*, 462 U.S. 151 (1983)]. No such uniformity is needed.[38]

Thus, not only this Court's holding in *Reed*, but the positions of the unions before the Court in that case completely and totally rule out the arguments made by CWA here. For the "near total" "overlap" between Title I cases and the instant case compels, as Fitz has stated, the application of the *Reed* principle, and not *DelCostello*.

CONCLUSION

By its silence on the point, CWA concedes that Fitz would have prevailed below if constitutional principles had been applied to his case. It does not contend that Fitz's federal complaint would be barred by the limitations period applicable to such claims. Therefore, whether there is sufficient state action in the natures of Fitz's claim and CWA's exercise of its authority as exclusive representative to demand and obtain his discharge, to apply the limitations period of constitutional claims to *Beck* cases warrants this Court's consideration because of the conflict between *Dean* and *Abrams/Price*. Further, whether *Beck* claims are so similar to constitutional claims as to warrant application of

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[36] *Id.* at 16.

[37] *Id.* at 22 n.8.

[38] *Id.* at 28 n.14.

the analysis in *Reed/Gould* rather than *DelCostello* raises a serious and substantial question of law which has not been but should be answered by this Court. These issues affect the respective rights and duties of employees and labor organizations, and, as a practical matter, affect whether employees can obtain any relief for *Beck* violations.

For all of these reasons this Court should grant certiorari and fully consider this case on the merits.

Respectfully submitted,

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